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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,

Petitioner,

v.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., and LUCKY STORES, INC.,

Respondents.

BRIEF OF THE CALIFORNIA RETAILERS ASSOCIATION AND THE CALIFORNIA MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether private plaintiffs—including state attorneys general—can obtain divestiture under Section 16 of the Clayton Act, 15 U.S.C. § 26, for alleged violations of Section 7 of the Clayton Act, 15 U.S.C. § 18, after the federal government has itself evaluated the challenged merger or acquisition and has entered into a consent agreement requiring structural relief that includes, *inter alia*, divestiture.

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ABA Antitrust Section, Monograph No. 16, *Private Litigation Under Section 7 of the Clayton Act: Law and Policy* (1989)	19
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BRIEF OF THE CALIFORNIA RETAILERS ASSOCIATION AND THE CALIFORNIA MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The California Retailers Association is a voluntary trade association for major California retailers. Its approximately 80 members, operating over 4,000 stores throughout California, include most major California department stores, supermarkets and chain drug stores, as well as some smaller specialty stores. The California Manufacturers Association is a voluntary non-profit membership organization representing approximately 800 manufacturing and processing companies headquartered or doing a substantial amount of business in California. Current membership

represents approximately 70 percent of California's industrial work force, and company sizes range from the smallest business to the largest multinational corporations in the world.

As a consequence of heightened federal scrutiny of corporate mergers, acquisitions and related transactions, the United States Government, through the Department of Justice and Federal Trade Commission, has become a regular participant in major corporate transactions involving amici's members. Such transactions increasingly are structured to accommodate the interpretation by these agencies of federal antitrust law and policy. Petitioner's argument in this proceeding threatens a serious disruption of federal efforts to promote uniform and consistent antitrust policy *vis à vis* such transactions, and subjects businesses, as well as investors and employees, to intolerable uncertainty when engaging in commercial activity. Because they are vitally interested in effective and uniform enforcement of the federal antitrust laws, amici file this brief in support of the Ninth Circuit's decision below.[1]

SUMMARY OF ARGUMENT

The Federal Trade Commission ("FTC"), operating pursuant to its authority under the Hart-Scott-Rodino Act[2] and pursuant to the FTC's consent decree au-

[1] Pursuant to Rule 36.2 of the Rules of this Court, this brief is filed with the consent of petitioner and respondents. Letters of consent from both parties are being filed concurrently herewith.

[2] Antitrust Improvements Act of 1976, Pub. L. 94-435, 15 U.S.C § 18a, *et seq.*

thority,[3] negotiated a decree whereby American Stores Co. ("American") was permitted to acquire Lucky Stores, Inc. ("Lucky") provided that American divested certain assets, including numerous supermarkets throughout California. Simultaneous with the FTC investigation and negotiations, the California Attorney General's office ("California") conducted its own investigation of the transaction, participated in the federal consent decree procedure, and objected to the proposed decree. When its suggestions regarding the scope of the proposed decree were not incorporated into the FTC's decree, and after the decree became final, California filed a Clayton Act suit in federal district court seeking a far more extensive divestiture. By persuading the district court to accept different market definitions and different operating assumptions than those applied by the federal agency specifically charged with protecting the public interest nationally, California has taken a major step towards undoing the careful work of that agency.

This case demonstrates precisely why seriatim and potentially conflicting divestiture remedies are not available to private parties under Section 16 of the Clayton Act, 15 U.S.C. § 26. If accepted, California's construction of Section 16 would enable all antitrust plaintiffs—including competitors, suppliers, customers, consumer groups and states, commonwealths and territories—to await the closing of a transaction that has been reviewed and approved by federal antitrust enforcement agencies and then to seek further structural relief that is inconsistent or incompatible with the federally approved transaction. This result would

[3] *See* 16 C.F.R. §§ 2.31-.34, 3.25 (1989).

introduce intolerable uncertainty into commercial transactions, into the investment community and into the labor force.

Such uncertainty inevitably will erode the effectiveness of coordinated federal antitrust enforcement efforts in several ways. The relief sought in this case will thwart the carefully structured pretransaction review process created by Congress in the Hart-Scott-Rodino Act by nullifying federal enforcement decisions which are based on such pretransaction review, and by eliminating all incentives for businesses to work with federal antitrust enforcement authorities to resolve competitive concerns in advance of the closing of transactions.

Similarly, the purposes of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), and analogous FTC procedures for negotiating and entering into antitrust consent decrees are defeated if private parties can seek to unwind a divestiture decree or other consent agreement upon which the federal government has placed its imprimatur. Where, as in this case, assets have already been sold to third parties pursuant to a divestiture agreement with the FTC, it is both unreasonable and inequitable to allow further restructuring at the behest of private parties relying on inconsistent arguments and theories. As a practical matter, the business community will simply stop negotiating consent agreements with federal antitrust enforcers because such agreements will assure them of nothing but the elimination of but one of many equally empowered potential "divestors" seeking more extensive, or inconsistent, structural relief.

California's argument that federal enforcement agencies cannot keep pace with merger activity and

that private divestiture is necessary to "plug gaps" in government enforcement, Pet. Br. at 30-35, is wholly without force, particularly in this case. California seeks divestiture *not* because the federal agencies were too overworked to evaluate the merger, but because California wants to substitute its judgment for the judgment of federal authorities as to how to restructure an industry under the federal antitrust laws. California's action, and similar actions by states, local governments, competitors or consumer groups manifestly will not enable the federal agencies to exercise their enforcement discretion more effectively or efficiently. To the contrary, it will undermine the detailed regime of federal enforcement by enabling such diverse and privately motivated parties to undo months and perhaps years of federal enforcement activities.[4]

ARGUMENT

The principal responsibility for enforcement of the federal antitrust laws resides in the federal government. *See United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Specifically, the Antitrust Division of the Department of Justice, and the Federal Trade Commission, have been given this enforcement role. 15 U.S.C. §§ 4, 15, 21, 45. In addition, Congress has

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[4] Contrary to petitioner's suggestion, this case does not threaten the ability of private plaintiffs to secure relief for federal antitrust violations. Neither respondents nor amici contend that private plaintiffs cannot seek appropriate relief to block threatened anticompetitive conduct or recover treble damages flowing from antitrust injuries. In private hands, those traditional antitrust remedies promote the goals of the federal antitrust laws. The relief sought in this case undermines those goals.

enacted provisions that enable private parties to seek some forms of federal antitrust relief in appropriate circumstances. 15 U.S.C. §§ 13, 18. As California has acknowledged, the principal purpose of creating these private rights of action was to "create a comprehensive enforcement scheme relying on *complementary* efforts of the government and its citizens," Pet. Br. at 25 (emphasis added) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969)), and to "fill gaps in the federal antitrust enforcement effort." *Id.* (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 334 (1979)).

California's divestiture lawsuit seeks neither to "fill gaps" in, nor to "complement" the enforcement efforts of, the federal government. Rather, it seeks relief that directly conflicts with the federal antitrust enforcement scheme by attempting to undo a carefully crafted enforcement determination by the FTC that approved American's acquisition of Lucky subject to substantial divestiture provisions and other structural relief.

A. The Remedy Sought By California Would Undermine The Federal Antitrust Enforcement Scheme

1. The Desired Relief Would Thwart the Pretransaction Procedures of the Hart-Scott-Rodino Antitrust Improvements Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 18a, *et seq.*, establishes, *inter alia*, "an elaborate process requiring those who attempt acquisitions above a specified size to notify the [Federal Trade] Commission and the Antitrust Division of their intentions, tc furnish information requested by the agencies, and to wait a period of time before consummating the transactions,

allowing the agencies to analyze the data." *Lieberman v. Federal Trade Commission*, 771 F.2d 32, 35 (2d Cir. 1985).

The overriding purpose of the HSR Act is to eliminate the need to invoke the remedy of divestiture. The Act "strengthen[s] the enforcement of Section 7 [of the Clayton Act] by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated." H.R. Rep. No. 1373, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572, 2637. The statute's notification and waiting provisions afford the federal government "a meaningful chance to win a premerger injunction—which is often the only effective and realistic remedy against large, illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened, in violation of the Clayton Act." *Id.* The HSR Act thus "reflects a congressional judgment that divestiture and other post-acquisition remedies were difficult, expensive and sometimes futile." *Mattox v. Federal Trade Commission*, 752 F.2d 116, 119 (5th Cir. 1985).

In particular, the HSR Act was enacted to "ease burdens on the courts by forestalling interminable post-consummation divestiture trials . . . ," H.R. Rep. No. 1373, *supra*, at 11, and to "advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." *Id.* While the HSR review process does not immunize the merging firms from private antitrust

liability, 15 U.S.C. § 18a(i)(1), permitting private divestiture proceedings by competitors or others seeking to undo decrees negotiated with, or transactions reviewed and approved by the Antitrust Division or the FTC, presents a square conflict with the HSR Act and its important goals. *Cf.* Amicus Curiae Brief on Petition for Certiorari of the United States, at 9 n.9, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (No. 85-473).

This point has been addressed by courts of appeals in a slightly different context. Premerger notification materials submitted pursuant to the HSR Act must contain relevant information that is necessary to enable the FTC and the Justice Department to determine whether a proposed acquisition would violate the federal antitrust laws if consummated. 15 U.S.C. § 18a(d). These materials may not be "made public." 15 U.S.C. § 18a(h). In *Mattox*, *supra*, the Fifth Circuit held that this provision precluded disclosure of HSR materials to state attorneys general because, *inter alia*, such disclosure might serve as "a disincentive to prompt and complete compliance with the premerger notification procedures by potential merger partners." 752 F.2d, at 122. Moreover,

> [b]ecause HSR only covers transactions likely to affect the entire national economy, Congress may have wanted to centralize regulation of such mergers in the FTC and the Justice Department. Disclosure to state attorneys general would tend to balkanize that needed centrality. This case would be an example of such a problem: here, Texas seeks premerger materials with an eye toward a possible attack on a merger that the FTC has already tentatively approved.

Id.

Similarly, in *Lieberman*, *supra*, the Second Circuit rejected the Connecticut Attorney General's argument that he was entitled to review HSR disclosure materials in part because the Act was intended to facilitate prompt *premerger* relief and thereby the need to avoid divestiture. The court observed, "[w]e doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to Commission or Justice Department decisions whether to block large-scale mergers of national or international significance." *Lieberman*, 771 F.2d, at 40.[5]

This case illustrates the reasons for the concerns of the courts of appeals in *Mattox* and *Lieberman*.

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[5] Although the HSR Act did not eliminate a private plaintiff's Section 16 right to obtain pretransaction injunctive relief, the legislative history of the HSR Act fully supports the Second Circuit's analysis in *Lieberman* when viewed in the context of divestiture. As Representative Rodino explained in discussing why the Conference Committee omitted reference to injunctive relief in describing the parens patriae authority granted to state attorneys general in the new legislation:

> The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. Provision for [broader] equitable relief; that is, *decrees of divestiture, was squarely rejected by the House conferees in the belief that State attorneys general should not be authorized to file parens suits seeking divestiture.*

122 Cong. Rec. H10,295-96 (daily ed. Sept. 16, 1976) (statement of Rep. Rodino) (emphasis added).

American voluntarily produced to California its entire HSR submission prior to the filing of the FTC's complaint and publication of the settlement order. Based on those HSR materials and its own investigation, California participated in the notice and comment proceedings relating to the proposed FTC consent decree. Rather than seeking a preliminary injunction to maintain the *status quo* before respondents were "irreversibly scrambled together," California waited until the consent agreement had been entered as an FTC order and then, because it disagreed with the FTC's application of the federal antitrust laws to the transaction, filed suit in federal court seeking to undo the FTC's carefully crafted divestiture decree and pursuing inconsistent relief. In short, California used the HSR disclosure, which is designed to *eliminate* the need for divestiture, to "attack . . . a merger that the FTC had already . . . approved" and to seek divestiture. *See Mattox*, 752 F.2d, at 122. This practice—and the private divestiture remedy that would permit it—cannot be reconciled with the purposes of the HSR Act.

2. Seriatim Divestiture Proceedings of the Type Advocated by California Would Defeat Judicial and Regulatory Consent Decree Mechanisms

Like the HSR Act, the consent judgment provisions of the APPA, 15 U.S.C. § 16(b)-(h), are aimed at achieving prompt and efficient resolutions of federal antitrust disputes. "The APPA was adopted in the wake of concerns that government consent decrees had been entered in secrecy and without adequate attention to the public interest." *United States v. LTV Corp.*, 746 F.2d 51, 52 n.2 (D.C. Cir. 1984). The statute established comprehensive procedures for the settlement of civil antitrust actions brought by the government. The FTC has adopted parallel regulations governing settlement of administrative complaints filed by the Commission. 16 C.F.R. §§ 2.31-.34, 3.25.

The APPA requires that "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws," be filed in the district court in which the action is pending and published in the Federal Register at least sixty (60) days prior to the effective date of the judgment. 15 U.S.C. § 16(b). During this 60-day period, the United States must "receive and consider" written public comments on the proposed consent judgment. 15 U.S.C. § 16(d).

In order to ensure that the public has sufficient information upon which to base such comments, the APPA further mandates that the United States make publicly available the proposal and supporting materials and information, and that it file with the district court and publish in the Federal Register a "competitive impact statement" detailing the nature of the proceeding, the alleged antitrust violation, an explanation of the proposal, the remedies available to private plaintiffs, the procedures available for modification of the proposal, and a description of alternatives to the proposal actually considered by the United States. 15 U.S.C. § 16(b)(1)-(6).[6] Any public comments and the federal government's responses

[6] Summaries of all of the information published in the Federal Register also must be published in certain newspapers of general circulation for certain periods of time. 15 U.S.C. § 16(c).

thereto also must be published in the Federal Register. 15 U.S.C. § 16(b) & (d).

Before entering a consent judgment, the district court must "determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e). In making the public interest determination, the court has broad authority to take testimony and gather evidence. In addition, the district court can authorize "full or limited participation in proceedings before the court by interested persons or agencies," such as third-party intervention or the filing of amicus curiae briefs. 15 U.S.C. § 16(f)(3). Although it has been held that persons who participate but do not formally intervene are not entitled to appeal from consent judgments,[7] *any* participant may move to take testimony of government officials or expert witnesses, 15 U.S.C. § 16(f)(1), and *any* interested person may be permitted to examine such witnesses. 15 U.S.C. § 16(f)(3). The district court is instructed to consider the effect on the "public generally and individuals alleging specific injuries," as well as the public comments and responses elicited by the procedures discussed above, in deciding whether the consent judgment is in the "public interest." 15 U.S.C. §§ 16(e), 16(f).

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[7] *See, e.g., United States v. LTV Corp.*, 746 F.2d 51, 53-54 (D.C. Cir. 1984). Upon demonstrating that the United States is not adequately representing the "public interest," a private party may be entitled to intervene in a government antitrust action. *Id.*, at 54 & n.7, *and cases cited*. Moreover, "[o]bjectors to consent judgment may seek to intervene in the proceedings for the limited purpose of appeal." *Id.*, n.7 (citing, *inter alia*, *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (*summary affirmance*)).

The FTC's regulations governing consent settlement agreements in proceedings brought by that agency establish a similar procedure. *See* 16 C.F.R. § 2.31-.34, 3.25. Those regulations require the Commission to publish in the Federal Register a consent agreement it has initially accepted, along with the accompanying order and explanation of the provisions of the order. The Commission also must make available to the public any other information that will enable interested persons to evaluate the terms of the order. For a period of sixty (60) days after publication, the Commission must receive and consider public comments and then decide, based upon such comments, whether to withdraw its acceptance of the agreement. 16 C.F.R. § 3.25.

The APPA, and the parallel FTC regulations, provide a comprehensive mechanism for settling with finality government antitrust suits. The private divestiture remedy that California claims will serve as a "complementary" component to enforcement of the federal antitrust laws would in fact allow private plaintiffs to ask federal courts to veto court-approved or, as in this case, agency-approved, consent agreements deemed by the enforcement authorities to be in the public interest.[8]

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[8] Permitting non-parties that failed successfully to intervene in FTC proceedings, 16 C.F.R. § 3.14, to bring a direct judicial challenge, by way of appeal, to the FTC's determination that a consent decree is in the public interest may improperly encroach upon the broad enforcement discretion of the agency. *See Action on Safety and Health v. Federal Trade Commission*, 498 F.2d 757, 762 (D.C. Cir. 1974). *Cf. United States v. LTV Corp., supra*, 746 F.2d, at 55 ("given that an important purpose of the [APPA] was to preserve the consent judgment as a method of resolving

At a more fundamental level, the remedy that California seeks will emasculate the detailed HSR and APPA procedures enacted by Congress by rendering the business community unwilling to negotiate pre-transaction or post-transaction settlements with federal antitrust authorities. As a practical matter, the continued threat of further lawsuits seeking structural relief will either eliminate settlement discussion or will require a much larger table, with enough chairs to accommodate fifty state attorneys general, an undetermined number of consumer and public interest groups, all potential competitors and, if a hostile takeover is involved, the target.

Moreover, such open-ended settlement discussions would be exercises in futility, since each group represented can be expected to pursue its own agenda. Thus, while the federal government will urge a resolution it deems consistent with federal antitrust and public policy, each other group will presumably advocate its own competing and conflicting goals, all in the name of the federal antitrust laws. *See* n.14, *infra*. The risk that a settlement with the federal government will represent simply a first step in the gradual carving up of a corporate transaction will either chill efficiency-producing transactions or will persuade business to forego settlement in favor of a full trial on the merits. This result is wholly at odds

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government antitrust cases, it would be anomalous to conclude that Congress intended to permit persons who had not even attempted to intervene in the proceedings to appeal, and thereby disrupt, the entry of a final consent judgment") (footnote omitted). California's attempt to obtain conflicting structural relief in this case is equally intrusive of the Commission's enforcement determinations.

with Congress's desire to "ease burdens on the courts by forestalling interminable post-consummation divestiture trials . . . [and to] advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion." H.R. Rep. No. 1373, *supra*, at 11.

Neither the premerger injunction remedy nor the postmerger damage remedy that are available to private antitrust plaintiffs operate to undermine these carefully crafted HSR and APPA procedures. *Cf.* Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 Mich. L. Rev. 153, 167 n.93 (1983) ("A consent decree bars private parties from suing for injunctive relief, but does not bar private treble damage suits. Thus competitors will be bound to the structural relief approved in the decree . . ."). [9] Private divesti-

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[9] Decrees that determine the status of an entity are "proceedings *in rem* . . . . " *Local Loan Co. v. Hunt*, 292 U.S. 234, 241 (1934). Like proceedings under the federal bankruptcy laws, which are "*in rem* and . . . binding on, and *res judicata* as to, all the world, only in respect of the status of the bankrupt," *Myer v. International Trust Co.*, 263 U.S. 64, 73 (1923), divestiture should be viewed as a single proceeding in which all claims for structural relief under the federal antitrust laws must be resolved. *See also Gratiot County State Bank v. Johnson*, 249 U.S. 246 (1919); *Farrell v. O'Brien*, 199 U.S. 89 (1905); Restatement (Second) of Judgments § 31 (1982). *Cf. Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n.6 (1986). Such a rule would serve the " 'public interest . . . that the result attained should be firm and perpetual,' " *Farrell*, *supra*, 199 U.S., at 103 (*quoting Broderick's Will*, 88 U.S. (21 Wall.) 503, 509 (1874)), and ensure that the integrity of divestiture decrees obtained by the federal government are not needlessly and waste-

ture, on the other hand, would render these congressionally created procedures a nullity. The effect of a private divestiture suit, if successful, is uniquely disruptive of the consent judgment component of the federal scheme: it necessarily defeats the terms of government settlement agreements.

B. The Relief Sought By California In This Case Would Subvert The Goals Of The Federal Antitrust Laws

1. The Relief Sought by California Will Empower a Diverse and Unlimited Collection of Individuals to Effect Industry-Wide Change Because of Localized, Specific or Limited Economic Factors Rather Than General Public Policy Considerations

The remedy of divestiture is uniquely public in its purpose and effect. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) ("[d]ivestiture is itself an equitable remedy designed to protect the public interest"). While a divestiture decree is intended to and does have an effect on an entire economic market (or perhaps several markets), it is by no means clear that the illegal conduct divestiture is invoked to redress in any given case will

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fully relitigated. *Cf. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971) (principles of res judicata are intended to achieve fairness, judicial economy and efficient allocation of resources).

The binding nature of a divestiture decree would be limited to that remedy—it would not preclude litigation of issues of liability or damages in private actions brought by non-parties. *See Myer, supra*, 263 U.S., at 73. Thus, precluding private collateral challenges to federal divestiture decrees would strike an appropriate balance between the interests of fairness, finality, and efficiency on the one hand, and the interests of persons in seeking redress for antitrust injuries on the other.

have an equivalent effect on all members of that market or those markets. Consequently, a private divestiture remedy creates a serious risk of skewing competitive conditions in an entire market, as well as impairing the rights of nonculpable third parties, such as stockholders and employees of the divested company. *See* Van Cise, *Limitations Upon Divestiture*, 19 Geo. Wash. L. Rev. 147 (1950). Although competitive conditions in a marketplace may support a divestiture order, social, political or broader economic issues may counsel strongly against divestiture.

This Court recognized this precise point in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), where it cautioned that

> [i]n considering [antitrust remedies] . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the [antitrust laws]; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which . . . inspired and dominated the combination from the beginning.

221 U.S., at 185. Similarly, in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), this Court admon-

ished that while "injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest,. . . *one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.*" 221 U.S., at 78 (emphasis added).

Unlike federal enforcement authorities whose duty it is to make broad public policy judgments, a private antitrust plaintiff cannot be expected to factor these considerations into the decision whether to pursue a divestiture remedy. "To entrust the vindication of [a] public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress." *L. Singer & Sons v. Union Pacific Railroad Co.*, 311 U.S. 295, 306 (1940) (Frankfurter, J., joined by Roberts, Black, Douglas and Murphy, JJ.). *See also Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. 53, 649-50 (1914) (statement of Louis Brandeis).

Furthermore, "to allow any private interest to thresh out the complicated questions" that arise in determining the propriety of divestiture "is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues." *L. Singer & Sons*, 311 U.S., at 307. *See also Schrader v. National Screen Service Corp.*, 1955 Trade Cas. (CCH) ¶ 68,217, 71,009 (E.D. Pa. 1955), *rev'd on other grounds*, 238 F.2d 59 (3d Cir. 1956), *vacated on other grounds*, 352 U.S. 992 (1957) ("it has come to be generally recognized that considerations of policy are against decreeing divestiture or the complete destruction of a nationwide business at the suit of an

individual in a private action under the antitrust laws, particular [*sic*] where that would have a far-reaching and possibly adverse effect upon interests not proved to have participated"). As recently stated by the head of the Antitrust Division of the United States Department of Justice, "[a]ntitrust traditionally has been an arm of national economic policy, designed to enhance the workings of the market system .... It would be paradoxical to allow the central theme of this policy to be set by private litigants or office holders in the more than 50 states, territories, commonwealths, and possessions." Rill, *Antitrust: Where We Stand Today*, 57 Antitrust L.J. 6-7 (1988).[10]

It is no answer to suggest that the solution to this problem lies with the courts to prevent overaggressive utilization of the divestiture remedy.[11] Such a solution places the antitrust courts in an untenable position by requiring them to make broad public policy de-

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[10] *See also*, ABA Antitrust Section, Monograph No. 16, *Private Litigation Under Section 7 of the Clayton Act: Law and Policy*, 81 (1989) (emphasis added):

> Antitrust analysis of mergers typically involves an exercise of great factual complexity. Usually, the "structure, history and probable future" of a market must be examined in detail. The difficulty of this exercise is compounded by the unsettled nature of the evaluative criteria that may be applied. *The addition to the equation of an improperly motivated plaintiff whose theories and evidence will not be directed to elucidating the statutory inquiry increases significantly the likelihood of . . . error, but the error will be hidden in the inherent complexity and deliberate confusion.*

[11] *See* Comment, *Section 16 of The Clayton Act: Divestiture An Intended Type of Injunctive Relief*, 19 Pac. L.J. 143, 165 (1987).

terminations concerning the propriety of divestiture based solely on evidence furnished by self-interested private parties. This approach

> also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts.

L. Singer & Sons, 311 U.S., at 307.[12] The already overburdened federal courts cannot properly be asked to conduct supplemental evidentiary hearings to determine whether a proposed divestiture remedy unacceptably burdens some broader societal interests, or whether one divestiture remedy is better than another already ordered. These broader policy concerns can only properly be addressed *ex ante* by the enforcement authorities within the United States Government whose functions include making such

[12] In enacting the APPA, 15 U.S.C § 16, Congress specifically commanded the federal courts to consider the public policy ramifications of antitrust consent decrees entered into between the federal government and private parties. 15 U.S.C. § 16(e). The legislative history of this Act demonstrates severe resistance on the part of Congress to delegating this public policy function to the courts. *See generally* Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 Mich. L. Rev. 153, 167 n.97 (1983). This history demonstrates compellingly that placing the federal courts in the role of public policy maker is not something the Congress does lightly, and is not something that Congress can be assumed to have intended absent explicit statutory language to that effect.

determinations. Neither private parties—who lack the incentive—nor the courts—who lack the resources—can be expected effectively to screen unwarranted divestiture proceedings.

The need for such prelitigation diligence is particularly acute in the divestiture context. As noted by Professors Areeda and Turner, "[w]hen a substantive rule is deemed truly wise only if applied to 'significant' instances, the government plaintiff is more likely than the private plaintiff to withhold suit in lesser instances." 2 P. Areeda & J. Turner, *Antitrust Law* § 312a, at 37 (1978). Accordingly, "[s]ome possibly far-reaching rules of antitrust liability make sense and are administerable in practice only when there is a *responsible filtering* of (1) the cases presented to the court or (2) the company and industry reorganizations proposed." *Id.*, at 36 (emphasis added).

California argues that the "injunctive relief" language of Section 16 should be interpreted broadly to afford the fullest measure of equitable power, including the power to decree divestiture upon the request of a private party, because, *inter alia*, " 'the public interest is involved in a proceeding of this nature . . . .' " Pet. Br., at 13 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946)). However, a private plaintiff is likely to seek divestiture without regard to the public interest, "looking only to his own interest." *United States v. Borden Co.*, 347 U.S. 514, 519 (1954).[13]

[13] *See also*, ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act, Policy and Law*, App. A, at 78 (1977) ("Private competitors who bring a lawsuit to vindicate their own

Indeed, " 'the scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these.' " *Borden*, 347 U.S., at 518-19 (citation omitted). While "[t]he Government seeks its injunctive remedies on behalf of the general public . . .[,] the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served." *Id.*, at 518.

Nor is it relevant that the challenger in this case is the State of California purporting to bring suit as parens patriae on behalf of its citizens. *See* Pet. Br., at 26 n.5. While California's motives in seeking further divestiture are presumably beyond reproach, its efforts to undo the decree negotiated by the FTC demonstrate a perception of federal antitrust policy that is at odds with the policy views of the federal antitrust enforcement agencies.[14] Although California

private interests are not primarily motivated by the public interest").

[14] The federal antitrust laws embody a variety of economic and social theories and approaches that frequently conflict with one another. As Professors Areeda & Turner explain:

> In passing the antitrust laws "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." Yet this simple formulation is not self-defining, and conceals a diversity of possible objectives that are substantially consistent but yet sometimes inconsistent in critical respects.
>
> The economic objective of a pro-competitive policy is to maximize consumer economic welfare through

may be acting on behalf of some members of the public, it is necessarily motivated by a narrower or more localized reading of the public interest than are federal authorities. There is simply no guarantee that a private party *or* a state attorney general will pursue divestiture under an antitrust theory that is consistent with that of the federal government. As this case demonstrates, a defendant, such as American, is thus subject to conflicting and irreconcilable remedial demands.

The systemwide and extreme nature of the divestiture remedy, *see du Pont*, *supra*, 366 U.S., at 326, and the needed sensitivity to the underlying purposes and goals of the federal antitrust laws, suggest therefore that Congress would not have intended to place such a powerful weapon in the hands of private attorneys general. In all events, however, Congress cannot have intended to allow private parties to achieve structural relief in situations, such as this, in which federal enforcement authorities *have* in fact ex-

> efficiency in the use and allocation of scarce resources, and via progressiveness in the development of new productive techniques and new products that put those resources to better use. At the same time, competitive policy also promotes "populist" goals that are commonly thought important. It disperses wealth; limits business size; broadens entrepreneurial opportunities; and substitutes the impersonal forces of the market place for the economic power of private individuals or groups to exploit or coerce those with whom they deal.
>
> Economic and populist objectives may diverge when efficiencies dictate displacement of small firms by larger business units.

1 P. Areeda & D. Turner, *Antitrust Law* § 103, at 7-8 (1978) (footnote omitted).

ecuted their public office by reviewing challenged conduct and imposing a structural remedy in accordance with federal antitrust policy. Any such private remedy would serve to undermine, rather than promote, federal enforcement goals.

2. The Private Divestiture Remedy Will Produce Anticompetitive Results by Encouraging Inefficient Competitors and Entrenched Takeover Targets to Thwart Legitimate Economic Activity

The acceptance by this Court of California's argument also will encourage private litigation designed to harass competitors or thwart takeovers. As the Department of Justice itself has recognized, "[t]he antitrust laws would be perverted if they could be used to thwart transactions that would enhance competition; a suit for injunctive relief, as well as a suit for damages, must 'serve ... the high purpose of enforcing antitrust law.'" Amicus Curiae Brief on Petition for Certiorari of the United States, at 8, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (No. 85-473) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969)).[15]

[15] "Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors ... intimida[ting a potential defendant] into the sort of gentlemanly competitive behavior that is the antithesis of true competition." Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 254 (1985). *Accord* Miller, *Comments on Baumol and Ordover*, 28 J.L. & Econ. 267 (1985). Professors Baumol and Ordover further explain that the economic benefits of such "protectionist" litigation are not dissipated by litigation expense; consequently, costs are not a disincentive to the bringing of such harassment suits. Baumol & Ordover, *supra*, at 250.

Indeed, the case books demonstrate that competitors or takeover targets have pursued divestiture actions in spite of the fact that this Court has never recognized such a private remedy and in spite of the costs attendant to bringing such actions.[16] There is, therefore, no reason to assume that wasteful protectionist attacks on pro-competitive economic activities will not thrive in an environment where private di-

[16] *See, e.g., Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987) (district court allows divestiture relief requested by competitors of merging companies); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd on other grounds*, 259 F.2d 524 (2d Cir. 1958) (takeover target secures indirect divestiture under Section 16 of the Clayton Act by convincing the court to enjoin permanently the acquiring company from voting any shares, acquiring representation on the board of directors, or acquiring any additional stock of the target); *Schrader v. National Screen Serv. Corp.*, 1955 Trade Cas. (CCH) ¶ 68,217 (E.D. Pa. 1955), *rev'd on other grounds*, 238 F.2d 59 (3d Cir. 1956), *vacated on other grounds*, 352 U.S. 992 (1957) (request by competitor for decree that would, in effect, put defendant out of business); *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 107 F. Supp. 532 (S.D.N.Y 1952), *rev'd on other grounds*, 202 F.2d 731 (2d Cir. 1953) (original owners of 50% of stock of target corporation demand that acquirer of other 50% of stock be required to divest that stock to the corporation). *Cf. NBO Industries Treadway Companies, Inc. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977), in which the plaintiff challenged the acquisition by Brunswick of six failing bowling centers that were in direct competition with plaintiff. Although finding a Section 7 violation, the court rejected plaintiff's request for divestiture, concluding that such an order would *reduce* competition by putting plaintiff's competitors out of business. If divestiture was permitted in such a case, the court concluded, "what is intended as a shield for small competitors becomes a sword against the consumer." 523 F.2d, at 279.

vestiture is permitted. It was certainly not the goal of Congress in enacting the antitrust laws that interstate trade and commerce should be "needlessly disturbed by suits brought, on all sides and in every direction, to accomplish improper or speculative purposes." *Union Pacific Railroad Company v. Frank*, 226 F. 906, 909 (8th Cir. 1915) (quoting *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 71 (1904)). Yet this would be the consequence of private suits for divestiture under the Clayton Act.[17]

"In many situations, mergers serve no purpose except the pursuit of bigness. But some are distinctly beneficial to the achievement of a competitive economy." *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 621 (1966) (Fortas, J., dissenting). *See also* U.S. Dept. of Justice, Merger Guidelines §§ 1, 3.5 (June 14, 1984). Opening the doors of divestiture to private antitrust plaintiffs invites indiscriminate challenges to pro-competitive economic activity. Such challenges have been and, if California prevails, will continue to be motivated not by a broad commitment to the public good but rather by commercial self-interest. This is not a public interest that Congress sought to promote in enacting the antitrust laws.

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[17] The danger that misuse of the remedy of divestiture might result in anticompetitive forfeitures strongly suggests that Congress would not have intended to place so powerful a weapon in the hands of self-interested private prosecutors. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (private plaintiffs may not be appointed to prosecute criminal contempt actions against their adversaries because of conflict of interest; "public interest" can only be vindicated by a neutral prosecutor who will not be influenced by improper motives).

CONCLUSION

In creating both public and private remedies for violations of the federal antitrust laws, Congress sought to develop a scheme of complementary enforcement. Although Congress placed principal enforcement authority in the hands of the Department of Justice and the Federal Trade Commission, it also developed a system whereby "private attorneys general" could augment federal enforcement efforts by pursuing certain private antitrust remedies in appropriate circumstances. California's position in this case perverts Congress's enforcement scheme by authorizing private parties to override federal antitrust enforcement decisions and thereby subvert the goals of the federal antitrust laws. For these reasons, the judgment of the court of appeals should be affirmed.

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